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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

NOV 21 2002

In the Matter of)	FEDERAL COMMUNICATIONS COMMISSION
)	OFFICE OF THE SECRETARY
Amendment of Section 73.202(b),)	MM Docket No. 01-104
Table of Allotments,)	RM-10103
F M Broadcast Stations)	RM-10323
(Auburn, Northport, Tuscaloosa, Camp Hill,)	RM-10324
Gardendale, Homewood, Birmingham, Dadeville,)	
Orrville, Coodwater, Pine Level, Jemison, and)	
Thomaston, Alabama))	

To: Assistant Chief, Audio Division
Media Bureau

MOTION TO STRIKE

1. Cox Radio, Inc., and its wholly owned subsidiary CXR Holdings, Inc., (collectively, "**Cox**") and Radio South, Inc. ("Radio South"), by their attorneys, hereby move to strike the "Opposition to **P**etition for Reconsideration" filed by Preston W. Small ("Small") in the above-captioned proceeding ("Small Pleading"). Small is not an interested party in this proceeding and has no standing to oppose the **P**etition for Reconsideration. Moreover, despite being styled an "opposition," the Small Pleading raises no issue of law or fact which, even if true, would **result** in denial of the Petition for Reconsideration. Accordingly, the Commission should (i) strike the Small **P**leading from **the** record of this proceeding and (ii) grant the Petition for Reconsideration for all the reasons set forth therein.

I. SMALL HAS NO STANDING TO PARTICIPATE IN THIS PROCEEDING.

2. Only a person with an interest in the outcome of a proceeding has standing to participate in the agency deliberations leading to a **d**ecision in the proceeding. This conclusion follows from general principles of agency law. **U**nder the Administrative Procedure Act ("APA"), only an "interested person" has the right to appear before an agency in rule making matters. 5 U.S.C. § 555(b). The reason for **l**imiting participation to "interested persons" is

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obvious – to avoid burdening the agency with information that **is** irrelevant and immaterial to the outcome of a case. Thus, the APA limits agency participation rights to “interested persons” in order to promote “the orderly conduct of public business.” *Id.*

3. An “interested person” is one for whom there is a “likelihood of substantial injury” as a result of an adverse agency decision. *Philco Corporation v. FCC*, 257 F.2d 656 (D.C. Cir. 1958). Even when an agency regulation expressly permits “any person” to participate in an agency process (and there is no such express permission in this case), the phrase “any person” means any person with a “legitimate interest.” *ATX, Inc. v. Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994). The Commission does not have the power to expand the right of participation since the right of participation in agency **proceedings** is created by the APA, not the Communications Act. *See Envirocare of Utah v. Nuclear Regulatory Commission*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (courts do not defer to agency’s interpretation of APA). Thus, unless Small demonstrates that he has a “legitimate interest” in the outcome of this proceeding, the Commission cannot allow his participation and must strike his opposition.

4. Small has no interest whatsoever in the outcome of this proceeding. His interests lie in *another* proceeding before the Commission (MM Docket No. **98-112**) and whether the Petition for **Reconsideration** here is granted or denied affects Small not one bit. Small does not even make an attempt to demonstrate why his comments deserve consideration. Indeed, Small *flaunts* his lack of a legitimate interest, arguing that it is not necessary for him to justify his participation here “by any **statement** showing how [he] is adversely affected.” Small Pleading at

1.¹ His contempt for the orderly administration of agency business is visible on the face of the pleading. The Commission has no choice but to strike it

11. SMALL RAISES NO OPPOSITION TO THE GRANT OF THE PETITION FOR RECONSIDERATION.

5. Even if Small were an “interested party” with the ability to participate in this proceeding – which he is not – his pleading is utterly devoid of any reason why the Commission should not grant the Petition for Reconsideration. The entire pleading is repetitive, irrelevant, and erroneous, and the Commission should strike it on these grounds as well. In summary, the Small Pleading (1) erroneously accuses Radio South and its counsel of violating the Commission’s *ex parte* rules, a violation which, even if proved, could make no difference to the outcome of this proceeding; (2) argues that the Commission should not create an exception to a policy that does not even apply in this case; and (3) engages in unsupported speculation regarding a purported relationship between Cox and Radio South, or between WNNX LICO, Inc. and one or both of Cox and Radio South or between Cox and/or Radio South and Auburn Network, Inc. Nevertheless, Cox and Radio South address these substantive deficiencies in a separate Reply filed simultaneously herewith.

6. Since Small has no legitimate interest in this proceeding and advances no claim upon which relief can be granted, the proper action is dismissal of the pleading.

¹ Small claims a “right to file” in this proceeding, but if such a right exists, it is surely counterbalanced by the Commission’s right to strike his filing based on lack of a legitimate interest in this proceeding.

Respectfully submitted,

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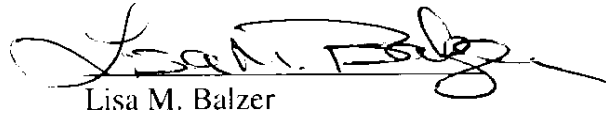
November 21, 2002

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy & Bacon L.L.P., do hereby certify that on this 21st day of November, 2002, I have mailed the foregoing "**Motion to Strike**" to the following:

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